

## Securities and Exchange Commission

## § 275.205-1

aa), the Securities Exchange Act of 1934 (15 U.S.C. 78a-mm), the Sarbanes-Oxley Act of 2002 (Pub. L. 107-204, 116 Stat. 745 (2002)), the Investment Company Act of 1940 (15 U.S.C. 80a), the Investment Advisers Act of 1940 (15 U.S.C. 80b), title V of the Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1338 (1999)), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311-5314; 5316-5332) as it applies to funds and investment advisers, and any rules adopted thereunder by the Commission or the Department of the Treasury.

(5) *Fund* means an investment company registered under the Investment Company Act.

(6) *Initial public offering* means an offering of securities registered under the Securities Act of 1933 (15 U.S.C. 77a), the issuer of which, immediately before the registration, was not subject to the reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)).

(7) *Limited offering* means an offering that is exempt from registration under the Securities Act of 1933 pursuant to section 4(2) or section 4(6) (15 U.S.C. 77d(2) or 77d(6)) or pursuant to §§ 230.504, 230.505, or 230.506 of this chapter.

(8) *Purchase or sale of a security* includes, among other things, the writing of an option to purchase or sell a security.

(9) *Reportable fund* means:

(i) Any fund for which you serve as an investment adviser as defined in section 2(a)(20) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(20)) (i.e., in most cases you must be approved by the fund's board of directors before you can serve); or

(ii) Any fund whose investment adviser or principal underwriter controls you, is controlled by you, or is under common control with you. For purposes of this section, *control* has the same meaning as it does in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(9)).

(10) *Reportable security* means a security as defined in section 202(a)(18) of the Act (15 U.S.C. 80b-2(a)(18)), except that it does not include:

(i) Direct obligations of the Government of the United States;

(ii) Bankers' acceptances, bank certificates of deposit, commercial paper and high quality short-term debt instruments, including repurchase agreements;

(iii) Shares issued by money market funds;

(iv) Shares issued by open-end funds other than reportable funds; and

(v) Shares issued by unit investment trusts that are invested exclusively in one or more open-end funds, none of which are reportable funds.

[69 FR 41708, July 9, 2004]

### §§ 275.204-4—275.204-5 [Reserved]

#### § 275.205-1 Definition of “investment performance” of an investment company and “investment record” of an appropriate index of securities prices.

(a) *Investment performance* of an investment company for any period shall mean the sum of:

(1) The change in its net asset value per share during such period;

(2) The value of its cash distributions per share accumulated to the end of such period; and

(3) The value of capital gains taxes per share paid or payable on undistributed realized long-term capital gains accumulated to the end of such period; expressed as a percentage of its net asset value per share at the beginning of such period. For this purpose, the value of distributions per share of realized capital gains, of dividends per share paid from investment income and of capital gains taxes per share paid or payable on undistributed realized long-term capital gains shall be treated as reinvested in shares of the investment company at the net asset value per share in effect at the close of business on the record date for the payment of such distributions and dividends and the date on which provision is made for such taxes, after giving effect to such distributions, dividends and taxes.

(b) *Investment record* of an appropriate index of securities prices for any period shall mean the sum of:

(1) The change in the level of the index during such period; and

(2) The value, computed consistently with the index, of cash distributions made by companies whose securities

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comprise the index accumulated to the end of such period; expressed as a percentage of the index level at the beginning of such period. For this purpose cash distributions on the securities

which comprise the index shall be treated as reinvested in the index at least as frequently as the end of each calendar quarter following the payment of the dividend.

EXHIBIT I

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE STANDARD & POOR'S 500 STOCK COMPOSITE INDEX FOR CALENDAR 1971]

Quarterly ending—	Index value <sup>1</sup>	Quarterly dividend yield-composite index	
		Annual percent <sup>2</sup>	Quarterly percent <sup>3</sup> (1/4 of annual)
Dec. 1970 .....	92.15		
Mar. 1971 .....	100.31	3.10	0.78
June 1971 .....	99.70	3.11	.78
Sept. 1971 .....	98.34	3.14	.79
Dec. 1971 .....	102.09	3.01	.75

<sup>1</sup> Source: Standard & Poor's Trade and Securities Statistics, Jan. 1972, p. 33.  
<sup>2</sup> *Id.* See Standard & Poor's Trade and Securities Statistics Security and Price Index Record—1970 Edition, p. 133 for explanation of quarterly dividend yield.  
<sup>3</sup> Quarterly percentages have been rounded to two decimal places.

Change in index value for 1971: 102.09–92.15=9.94.      Accumulated value of dividends for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}} = \frac{\text{March}}{1.0078} \times \frac{\text{June}}{1.0079} \times \frac{\text{Sept.}}{1.0079} \times \frac{\text{Dec.}}{1.0075} - 1.00 = .0314$$

Aggregate value of dividends paid, assuming quarterly reinvestment and computed consistently with the index:

(Percent yield as computed above) × (ending index value) = Aggregate value of dividends paid

For 1971:  
.0314 × 102.09 = 3.21

Investment record of Standard & Poor's 500 stock composite index assuming quarterly reinvestment dividends:

$$\frac{9.94 + 3.21}{92.15} = 14.27 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the S & P dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971 .....	93.99
Index value Nov. 30, 1970 .....	87.20
Change in index value .....	6.79

Quarter ending—	Dividend yield		Rate for each month of quarter (1/12 of annual)
	Annual rate	1/4 of annual	
Dec. 1970 .....	3.41	0.85	0.28
Mar. 1971 .....	3.10	.78	.26
June 1971 .....	3.11	.78	.26
Sept. 1971 .....	3.14	.79	.26
Dec. 1971 .....	3.01	.75	.25

Accumulated value of dividends reinvested:

December=1.0028  
January-March=1.0078  
April-June=1.0078  
July-September=1.0079  
October-November=1.0053<sup>4</sup>  
Dividend yield:

$$(1.0028 \times 1.0078 \times 1.0078 \times 1.0079 \times 1.0053) - 1.00 = .0320$$

Aggregate value of dividends paid computed consistently with the index:

$$.0320 \times 93.99 = 3.01$$

<sup>4</sup>The rate for October and November would be two-thirds of the yield for the quarter ended Sept. 30 (i.e. .667 × .79 = .5269) since the yield for the quarter ended Dec. 31 would not be available as of Nov. 30.

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Investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 30, 1971:

$$\frac{6.79 + 3.01}{87.20} = 11.24 \text{ percent}$$

### EXHIBIT II

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE NEW YORK STOCK EXCHANGE COMPOSITE INDEX FOR CALENDAR 1971]

(1)—Quarter ending	(2)—Index value <sup>1</sup>	(3)—Aggregate market value of shares listed on the NYSE as of end of quarter (billions of dollars) <sup>2</sup>	(4)—Quarterly value of estimated cash payments of shares listed on the NYSE (millions of dollars) <sup>3</sup>	(5)—Estimated yield <sup>4</sup> (quarterly percent)
Dec. 1970 .....	50.23			
Mar. 1971 .....	55.44	\$709	\$5,106	0.72
June 1971 .....	55.09	710	4,961	.70
Sept. 1971 .....	54.33	709	5,006	.71
Dec. 1971 .....	56.43	742	5,183	.70

<sup>1</sup>Source: New York Stock Exchange Composite Index as reported daily by the New York Stock Exchange.

<sup>2</sup>Source: Monthly Review, New York Stock Exchange.

<sup>3</sup>Source: The Exchange, New York Stock Exchange magazine, May, Aug., Nov. 1971 and Feb. 1972 editions. Upon request the Statistics Division of the Research Department of the NYSE will make this figure available within 10 days of the end of each quarter.

<sup>4</sup>The ratio of column 4 to column 3.

Change in NYSE Composite Index value for 1971: 56.43 - 50.23 = 6.20.

Accumulated Value of Dividends of NYSE Composite Index for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}} = \frac{\text{March}}{1.0072} \times \frac{\text{June}}{1.0070} \times \frac{\text{Sept.}}{1.0071} \times \frac{\text{Dec.}}{1.0070} - 1.00 = 0.0286$$

Aggregate value of dividends paid on NYSE Composite Index assuming quarterly reinvestment:

For 1971:

$$.0286 \times 56.43 = 1.61$$

Investment record of the New York Stock Exchange Composite Index assuming quarterly reinvestment of dividends:

$$\frac{6.20 + 1.61}{50.23} = 15.55 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the NYSE dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the NYSE Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971 .....	51.84
Index value Nov. 30, 1970 .....	47.41
Change in index value .....	4.43

Quarter ending	Dividend yield quarterly percent	Rate for each month of quarter (1/2 of annual)
Dec. 1970 .....	0.79	0.26
Mar. 1971 .....	.72	.24
June 1971 .....	.70	.23
Sept. 1971 .....	.71	.24
Dec. 1971 .....	.70	.23

Accumulated value of dividends reinvested:

December=1.0026

January-March=1.0072

April-June=1.0070

July-September=1.0071

October-November=1.0047<sup>4</sup>

Dividend yield:

<sup>4</sup>The rate for October and November would be two thirds of the yield for the quarter ended September 30 (i.e. .667 x .71 = 4736), since the yield for the quarter ended December 31 would not be available as of November 30.

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$(1.0026 \times 1.0072 \times 1.0070 \times 1.0071 \times 1.0047) - 1.00 = .0289$

Aggregate value of dividends paid computed consistently with the index:

$.0289 \times 51.84 = 1.50$

Investment record of the NYSE Composite Index for the 12 months ended November 30, 1971:

$$\frac{4.43 + 1.50}{47.41} = 12.51 \text{ percent}$$

(Secs. 205, 211, 54 Stat. 852, 74 Stat. 887, 15 U.S.C. 80b-205, 80b-211; sec. 25, 84 Stat. 1432, 1433, Pub. L. 91-547)

[37 FR 17468, Aug. 29, 1972]

### § 275.205-2 Definition of “specified period” over which the asset value of the company or fund under management is averaged.

(a) For purposes of this rule:

(1) *Fulcrum fee* shall mean the fee which is paid or earned when the investment company's performance is equivalent to that of the index or other measure of performance.

(2) *Rolling period* shall mean a period consisting of a specified number of subperiods of definite length in which the most recent subperiod is substituted for the earliest subperiod as time passes.

(b) The specified period over which the asset value of the company or fund under management is averaged shall mean the period over which the investment performance of the company or fund and the investment record of an appropriate index of securities prices or such other measure of investment performance are computed.

(c) Notwithstanding paragraph (b) of this section, the specified period over which the asset value of the company or fund is averaged for the purpose of computing the fulcrum fee may differ from the period over which the asset value is averaged for computing the performance related portion of the fee, only if:

(1) The performance related portion of the fee is computed over a rolling period and the total fee is payable at the end of each subperiod of the rolling period; and

(2) The fulcrum fee is computed on the basis of the asset value averaged

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over the most recent subperiod or subperiods of the rolling period.

(Secs. 205, 106A, 211; 54 Stat. 852, 855; 84 Stat. 1433, 15 U.S.C. 80b-5, 80b-6a, 80b-11)

[37 FR 24896, Nov. 22, 1972]

### § 275.205-3 Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.

(a) *General.* The provisions of section 205(a)(1) of the Act (15 U.S.C. 80b-5(a)(1)) will not be deemed to prohibit an investment adviser from entering into, performing, renewing or extending an investment advisory contract that provides for compensation to the investment adviser on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client, *Provided*, That the client entering into the contract subject to this section is a qualified client, as defined in paragraph (d)(1) of this section.

(b) *Identification of the client.* In the case of a private investment company, as defined in paragraph (d)(3) of this section, an investment company registered under the Investment Company Act of 1940, or a business development company, as defined in section 202(a)(22) of the Act (15 U.S.C. 80b-2(a)(22)), each equity owner of any such company (except for the investment adviser entering into the contract and any other equity owners not charged a fee on the basis of a share of capital gains or capital appreciation) will be considered a client for purposes of paragraph (a) of this section.

(c) *Transition rule.* (1) An investment adviser that entered into a contract before August 20, 1998 and satisfied the conditions of this section as in effect on the date that the contract was entered into will be considered to satisfy the conditions of this section; *Provided*, however, that this section will apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract after August 20, 1998.

(2) *Advisers to private funds with non-qualified investors.* If you are an investment adviser to a private investment company that is a private fund as that term is defined in § 275.203(b)(3)-1, and you were exempt from registration under section 203(b)(3) of the Act (15